



## **Weekly Summary of Cases**

### **National Labor Relations Board**

Week of August 16-20, 2010, W-3274

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### **Summarized Board Decisions**

***Rochester Gas & Electric Corporation*** (3-CA-25915; 355 NLRB No. 86) Rochester, NY, August 16, 2010. [[HTML](#)] [[PDF](#)]

The Board, agreeing with the administrative law judge, found that the employer, an electrical utility company, unlawfully refused to bargain over the effects of discontinuing its practice of allowing employees to drive company-issued vehicles to and from work. To remedy the violation, the Board ordered the employer to bargain with the union over the effects of its decision and to pay each employee the monetary value of the vehicle benefit until the earliest of the following conditions: (1) the parties bargain to agreement over the effects of discontinuing the benefit; (2) the parties reach an impasse in bargaining; (3) the union fails to request bargaining within 5 days after receipt of the Board's decision, or to begin negotiations within 5 days after receiving the employer's notice of its desire to bargain; or (4) the union fails to bargain in good faith. The Board ordered that the amount paid to any employee must not be less than the monetary value of the vehicle benefit for a 2-week period. The Board observed that its remedy was similar to that in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

Charge was filed by Local Union 36, International Brotherhood of Electrical Workers, AFL-CIO. Administrative Law Judge Wallace H. Nations issued his decision June 12, 2008. Chairman Liebman and Members Schaumber and Becker participated.

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***Plaza Auto Center, Inc.*** (28-CA-22256; 355 NLRB No.85) Yuma, AZ, August 16, 2010. [[HTML](#)] [[PDF](#)]

The Board found that the employer, a seller of pre-owned vehicles, violated Section 8(a)(1) by discharging an employee based on his profane outburst in a private meeting with the employer's owner and two sales managers about wages and working conditions. Member Schaumber, dissenting, agreed with the administrative law judge that the employee forfeited the protection of the Act by his outrageous conduct. (No party appealed the ALJ's findings that the employee had engaged in protected concerted activity under the Act by questioning the employer's policies concerning breaks, restroom facilities, and wages and that the employer violated Section 8(a)(1) by responding to the employee's inquiries by saying that, if he disliked the policies, he did not need to work there.)

Charge was filed by an Individual. Administrative Law Judge Lana H. Parke issued her decision July 21, 2009. Chairman Liebman and Members Schaumber and Pearce participated.

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***Caterpillar, Inc.*** (13-CA-43506; 355 NLRB No. 91) Joliet, IL, August 17, 2010. [[HTML](#)] [[PDF](#)]

Reversing the administrative law judge's decision, the Board concluded that Caterpillar violated Section 8(a)(5) of the Act by announcing and implementing a change in unit employees' prescription-drug benefits without giving the Union advance notice of the proposed change and an opportunity to bargain about it.

Charge was filed by International Association of Machinists and Aerospace Workers, Local Lodge No. 851, AFL-CIO. Administrative Law Judge Bruce D. Rosenstein issued his decision February 2, 2007. Chairman Liebman and Members Becker and Pearce participated.

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***Mandalay Corp., d/b/a Mandalay Bay Resort & Casino*** (28-RC-6596; 355 NLRB No. 92) Las Vegas, NV, August 17, 2010. [[HTML](#)] [[PDF](#)]

The Board reversed the administrative law judge and found that the employer, a resort and casino operator, engaged in objectionable conduct in an election among its security officers by improperly soliciting grievances and implicitly promising to remedy them. The Board found that statements by the employer's CEO and executive vice president, a few days before the election, that a revised overtime policy was "a failed strategy . . . and it was being addressed and looked at" were objectionable, and it ordered a new election. The Board either adopted the judge's recommendations to overrule the remaining objections or found it unnecessary to pass on them. Member Schaumber, dissenting, found that the statements at issue were not coercive because they were consistent with the employer's pre-existing practice and were also protected expressions of opinion.

Petitioner – International Union, Security, Police and Fire Professionals of America (SPFPA). Administrative Law Judge James M. Kennedy issued his decision October 2, 2008. Chairman Liebman and Members Schaumber and Pearce participated.

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***El Paso Electric Company*** (28-CA-21111, et al.; 355 NLRB No. 95) El Paso, TX, August 18, 2010. [[HTML](#)] [[PDF](#)]

The Board adopted the administrative law judge's findings that the Respondent's CEO violated Section 8(a)(5) of the Act by dealing directly with a bargaining unit employee about a contract proposal that was the subject of ongoing negotiations with the Union. The Board further affirmed the judge's conclusions with respect to all other issues for the reasons set forth in his decision, except that in affirming the judge's conclusion that Section 10(b) bars the allegation that the Respondent violated Section 8(a)(5) by unilaterally changing its lunch and break time rule, the Board found that the Union's filing of a grievance on May 18, 2006, without more, proved that it had actual notice of the rule change outside of the 6-month limitations period.

Member Schaumber partially dissented, stating that he would reverse the judge's findings that the Respondent violated Section 8(a)(5) of the Act by (1) unilaterally changing the amount of time allowed for its service department employees to leave the yard in the morning, and (2) directly dealing with unit employees. With respect to the unilateral change in the amount of time allowed to leave the yard, Member Schaumber noted that he would find that the Respondent allowed the employees to take the same amount of time to leave the yard in the morning after June 2 as it did before and that the Respondent's June 2 announcement did not constitute a "material, substantial, and significant" change in the time allotted to leave the yard in the morning. As for the issues relating to the direct dealing with unit employees, Member Schaumber noted that the majority does not explain that the communications were instigated principally by the employee, nor does it sufficiently focus, in his view, on the nature of the communications.

Charges filed by International Brotherhood of Electrical Workers, Local Union 960, AFL-CIO. Administration Law Judge George Carson II issued his decision September 21, 2007. Chairman Liebman and Members Schaumber and Pearce participated.

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***Fred Meyer Stores, Inc.*** (36-RD-1724, 355 NLRB No. 93) Coos Bay, OR, August 18, 2010. [[HTML](#)] [[PDF](#)]

The Board found that a decertification election held on August 7, 2009 should be set aside and a new election held. The Board found that a fair election could not be held that day because of confusion and consternation caused by "unusual, substantial, and unexplained paycheck deductions" on the day of the election and the week before. Those deductions resulted from the employer's attempt to make up for missed deductions caused by computer problems unrelated to the election. In light of its decision to set aside the election on the basis of the paycheck deductions, the Board found it unnecessary to decide whether the election should be set aside on the basis of alleged employer restrictions on the union's access to employees after the decertification petition was filed.

Petitioner – United Food and Commercial Workers, Local Union No. 555. Hearing Officer John H. Fawley issued his Report on Objections and Recommendation October 9, 2009. Chairman Liebman and Members Schaumber and Becker participated.

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***Local 190, Laborers International Union of North America, AFL-CIO (VP Builders, Inc.)*** (3-CB-8687; 355 NLRB No. 90) Albany, NY, August 18, 2010. [[HTML](#)] [[PDF](#)]

The Board reversed the decision of the administrative law judge and concluded that Laborers Local 190 did not violate the Act by attempting to cause, and causing, VP Builders to terminate the employment of the Charging Party. Contrary to the judge, the Board unanimously agreed that VP was bound to a project labor agreement containing union referral provisions that were applicable to the project for which VP had hired the Charging Party. The Board further concluded that, as the General Counsel had litigated (and Local 190 defended) the case on a narrow theory – that Local 190's conduct violated the Act because VP was not bound to the project labor agreement – it would violate Local 190's due process rights to find a violation based on Local 190's failure to establish that the referral procedures set forth in the agreement established an *exclusive* hiring hall arrangement. Accordingly, the Board dismissed the

complaint. Member Schaumber, dissenting in part, noted that the existence of an exclusive hiring hall arrangement is an affirmative defense for which Local 190 bears the burden of proof. In his view, neither the facts of the case nor Board precedent provide support for the majority's decision to dismiss the complaint and relieve Local 190 of its burden of proof.

Charge was filed by an Individual. Administrative Law Judge Joel P. Biblowitz issued his decision December 27, 2007. Chairman Liebman and Members Schaumber and Pearce participated.

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***The Lorge School*** (2-CA-37967; 355 NLRB No. 94) New York, NY, August 19, 2010. [[HTML](#)] [[PDF](#)]

In this compliance matter, the Board adopted the administrative law judge's rejection of the Respondent's argument that the discriminatee failed to adequately mitigate her damages by curtailing her search for employment in her field (education) to pursue self-employment as a restauranteer/caterer, and by limiting her initial job search to Manhattan and Bronx, NY. In adopting the judge's findings, the Board distinguished the case *Aero Ambulance Service*, 349 NLRB 1314 (2007), in which the Board tolled backpay for a discriminatee who refused to look for work in his field, seeking only lower-paying jobs in a different profession. The Board explained that, in this case, the discriminatee conducted an exhaustive 8-month job search that included applications to over 600 jobs.

Charge filed by an Individual. Administrative Law Judge Joel P. Biblowitz issued his decision November 18, 2009. Chairman Liebman and Members Becker and Pearce participated.

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***Altercare of Wadsworth Center for Rehabilitation and Nursing Care, Inc.*** (8-CA-37436; 355 NLRB No. 96) Wadsworth, OH, August 19, 2010. [[HTML](#)] [[PDF](#)]

The Board unanimously adopted the administrative law judge's findings that the employer did not violate the Act by verbally directing employees to remove pronoun buttons and pulleys. The Board found that the verbal directions did not constitute disciplinary action sufficient to support a violation because they were excluded from the employer's progressive disciplinary system, and thus did not lay a foundation for future disciplinary action against the employee. In contrast, the Board majority (Chairman Liebman and Member Becker) found that the employer did violate the Act by issuing verbal warnings to employees to refrain from discussing union matters during work time. The majority explained that the verbal warnings were included in the employer's progressive disciplinary system, and further were administered by the employer's highest-level officials, and thus may be taken into consideration by the employer in determining whether discipline is warranted for future infractions. Member Schaumber found that the verbal warnings did not violate the Act because they were not documented, and thus did not constitute discipline within the meaning of the employer's progressive disciplinary system.

Charge filed by Service Employees International Union, District 1199. Administrative Law Judge Michael A. Rosas issued his decision September 12, 2008. Chairman Liebman and Members Schaumber and Becker participated.

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## **Decisions in cases involving prior rulings by two-member Board**

The following cases involve prior rulings by the two-member Board, whose authority to act was rejected by the U.S. Supreme Court decision in *New Process Steel, LP* (June 17, 2010). The new decisions summarized here were reached by a three-member panel of the Board or by the full Board.

***Diversified Enterprises, Inc.*** (9-CA-43110; 355 NLRB No. 88) Mount Hope, WV, August 13, 2010. [[HTML](#)] [[PDF](#)]

The Board adopted the administrative law judge's finding that the Respondent violated the Act by demoting a foreman and revoked other privileges and benefits because of his union activity. The Board also adopted the judge's findings that the Respondent violated the Act by making threats and other coercive statements. The Board rejected the Respondent's arguments that the foreman was a statutory supervisor and that the ALJ violated due process by failing to enforce its subpoena duces tecum.

Charge was filed by the Mid-Atlantic Regional Council of Carpenters, West Virginia District, United Brotherhood of Carpenters and Joiners of America. Administrative Law Judge Eric M. Fine issued his decision July 27, 2007. Chairman Liebman and Members Schaumber and Hayes participated.

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***Domsey Trading Corporation, Domsey Fiber Corporation and Domsey International Sales Corporation, a Single Employer*** (29-CA-14548 et al.; 355 NLRB No. 89) Brooklyn, NY August 16, 2010. [[HTML](#)] [[PDF](#)]

The Board considered Region 29's various motions for summary acceptance of its recalculations of backpay and ordered the Respondent to pay the discriminatees named in the Region's Third Amended Appendix F the backpay amounts set out there, as to which there was no dispute. The Board also ordered the Respondent to place in escrow with the Regional Director for Region 29 for a period of one year the backpay amounts for certain other discriminatees. Finally, the Board affirmed the judge's rulings, findings, and conclusions set out in his second supplemental decision and ordered the Respondent to pay the discriminatees considered in that decision the amounts set out there.

Charges filed by International Ladies' Garment Workers' Union, AFL-CIO and Local 99, International Ladies' Garment Workers' Union, AFL-CIO. Administrative Law Judge Michael A. Marcionese issued his Second Supplemental Decision on July 1, 2008. Chairman Liebman and Members Schaumber and Becker participated.

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## **Unpublished Board Decisions in Representation Cases**

***TSL, Ltd.*** (6-RC-12727) Pittsburgh, PA, August 13, 2010. Order granting Employer's motion for permission to file answering brief to Petitioner's exceptions to the Hearing Officer's report on objections. Petitioner – General Teamsters, Chauffeurs and Helpers Local 249 a/w International Brotherhood of Teamsters.

***Fire & Access Control Systems.Com, Inc., d/b/a Jerry Dickerson Automatic Fire Protection*** (16-RC-10942) Waco, TX, August 13, 2010. Order denying Employer's request for review of the Regional Director's decision and direction of election. Petitioner – Road Sprinkler Fitters Local 669, U.A., AFL-CIO. Member Hayes dissenting: would have granted the Employer's request for review. Chairman Liebman and Members Pearce and Hayes participated.

***Berg Drywall, LLC*** (28-RC-6684) Phoenix, AZ, August 18, 2010. Decision on Review and Order affirming Regional Director's conclusion and remanding the case to the Regional Director for further appropriate action. Chairman Liebman and Members Pearce and Hayes participated.

***A & E Transportation*** (3-RC-11946) Rochester, NY, August 19, 2010. No exceptions having been filed to the Hearing Officer's report recommending disposition of objections for an election held December 18, 2009, the Board adopted the Hearing Officer's findings and recommendations, and found that a certification of representative should be issued.

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## **Decisions of Administrative Law Judges**

***Wyndham Resort Development Corporation d/b/a Worldmark by Wyndham*** (28-CA-22680; JD(SF)-34-10) Las Vegas, NV. Charge filed by an Individual. Administrative Law Judge Gerald Foley issued his decision August 18, 2010. [[HTML](#)] [[PDF](#)]

***Times Union, Capital Newspapers Division of the Hearst Corp.*** (3-CA-27247, 27367; JD-44-10) Colonia, NY. Charges filed by The Newspaper Guild of Albany, TNG-CWA Local 31034. Administrative Law Judge Mark Carissimi issued his decision August 18, 2010. [[HTML](#)] [[PDF](#)]

***SEIU Healthcare Michigan*** (7-CA-52402; JD-45-10) Detroit, MI. Charge filed by an Individual. Administrative Law Judge Ira Sandron issued his decision August 18, 2010. [[HTML](#)] [[PDF](#)]

***Inova Health System*** (5-CA-35104, 35331; JD-47-10) Fairfax, VA. Charges filed by The Nurses Association for Patient Safety. Administrative Law Judge Arthur J. Amchan issued his decision August 18, 2010. [[HTML](#)] [[PDF](#)]

***IFG-Stockton Management, L.P.*** (32-CA-24926; JD(SF)-35-10) Stockton, CA. Charge filed by International Union of Operating Engineers, Stationary Engineers Local 39, AFL-CIO. Administrative Law Judge Jay R. Pollack issued his decision August 19, 2010. [[HTML](#)] [[PDF](#)]

***Fresenius USA Manufacturing, Inc.*** (2-CA-39518; JD(ATL)-17-10) Chester, NY. Charge filed by International Brotherhood of Teamsters, Local 445. Administrative Law Judge Margaret G. Brakebusch issued her decision August 19, 2010. [[HTML](#)] [[PDF](#)]

***Carr Finishing Specialties, Inc. and G.P.C. Construction, Inc.*** (3-CA-27264; JD-48-10) Rochester, NY. Charge filed by International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers. Administrative Law Judge Bruce D. Rosenstein issued his decision August 20, 2010. [[HTML](#)] [[PDF](#)]

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